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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 293

JOSEPH G. WENNING, *Petitioner*,

v.

THE PEOPLES BANK COMPANY OF COLDWATER, OHIO; JOHN C. WEIGEL; JOSEPH PLEIMAN; GEORGE FRONING; EMMA FRONING; LAWRENCE M. DAVIS; RALPH J. AHLERS; THE CENTURY INDEMNITY COMPANY OF HARTFORD, CONNECTICUT; THE UNITED STATES FIDELITY AND GUARANTY COMPANY, OF HARTFORD, CONNECTICUT, *Respondents*.

On Petition for Writ of Certiorari to the Supreme Court of the State of Ohio.

BRIEF FOR RESPONDENTS THE PEOPLES BANK COMPANY OF COLDWATER, OHIO; JOHN C. WEIGEL AND JOSEPH PLEIMAN IN OPPOSITION.

HENRY J. KNAPKE,
Celina, Ohio,

KAHL K. SPRIGGS,
Washington, D. C.,
Attorneys for Respondents

The Peoples Bank Company of Coldwater, Ohio; John C. Weigel, and Joseph Pleiman.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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On Petition for a Writ of Certiorari to the Supreme Court of the State of Ohio.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

ELMER MCCLAIN,
Lima, Ohio

Counsel for Petitioner, Joseph G. Wenning.

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NO.

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Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Ohio.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

PETITION.

(The Brief in support of this petition begins at page 21.
All emphasis in both Petition and Brief is supplied unless stated otherwise.)

To the Honorable Fred M. Vinson, Chief Justice, and Associate Justices of the Supreme Court of the United States.

Your petitioner respectfully shows:

I.

A SUMMARY STATEMENT OF THE MATTER INVOLVED.

1. The Issues.

First Issue. The validity of certain statutes of the United States, namely Title 11 USC, section 203 subsections (a) to (r), particularly subsections (n) (o) and (p) and Section 203, subsection (s) is drawn in question.

Second Issue. The validity of certain statutes of the State of Ohio, particularly General Code, Sections 11588, 11688, and 11690, is drawn in question as being, in their application, repugnant to the Constitution and the laws of the United States.

Third Issue. The title, right, privilege and immunity set up and claimed by the petitioner under the Constitution and statutes of the United States.

Fourth Issue. The right, privilege and immunity set up and claimed under an authority exercised under the United States through a conciliation commissioner of the United States.

Fifth Issue. Whether state courts may finally decide a federal question not in accord with applicable decisions of this Court.

Sixth Issue. Whether a state court and its officers and litigants therein may disregard a restraining order issued

and served by an officer of the United States, namely a conciliation commissioner, issued and served by authority exercised under the United States.

Seventh Issue. Whether the petitioner has not been deprived of his property without due process of law and denied equal protection of the laws by the State of Ohio in violation of the Fourteenth Amendment to the Constitution of the United States.

Eighth Issue. Whether the courts of the State of Ohio have not violated Article I, Section 8, Fourth Clause of the Constitution by sanctioning authority exercised by an Ohio Court to supercede the laws of the United States on the subject of bankruptcies.

Ninth Issue. Whether the courts of Ohio have not sanctioned disregard of Article VI of the Constitution by an Ohio court in its disregard of the Constitution and laws made in pursuance thereof.

Tenth Issue: Whether any act, order or proceeding of a court which is performed or issued by the judge of a court, which judge and court are each without any power, authority or jurisdiction, wherefore said act, order or proceeding is a nullity and utterly void, may later *ex post facto* be made to be effective as if never void or a nullity.

2. The Statutory Law.

Statutes of the United States.

The statutes of the United States, the validity of which is drawn in question and under which the petitioner claims title, right and immunity is Title 11 USC, section 203, usually referred to as Section 75 of the Bankruptcy Act

or the farmer debtor law, consisting of two parts separately enacted, namely (1) subsections (a) to (r), and (2) subsection (s). The pertinent provisions thereof are:

11 USC, section 203 (c), ed. of 1934, [Sec. 75(c)]:

"(c) At any time within five years after March 3, 1933", [which date was extended at various times by appropriate legislation] "a petition may be filed by any farmer, stating that the farmer is insolvent or unable to meet his debts as they mature, and that it is desirable to effect a composition or an extension of time to pay his debts."

11 USC, section 203(n), ed. of 1934 [Sec. 75(n)]:

"(n) The filing of a petition pleading for relief under this section shall subject the farmer and his property, wherever located to the exclusive jurisdiction of the court." . . .

11 USC, section 203(n), Supplement III, ed. of 1934 [Sec. 75(n)], effective August 28, 1935, did not materially change the foregoing.

11 USC, section 203 (o) [Sec. 75 (o)], ed. of 1934:

"(o) Except upon petition made to and granted by the judge after hearing and report by the conciliation commissioner, the following proceedings shall not be instituted, or if instituted at any time prior to the filing of a petition under this section, shall not be maintained, in any court or otherwise, against the farmer or his property, at any time after the filing of the petition under this section, and prior to the confirmation or other disposition of the composition or extension proposal by the court:

(1) Proceedings for any demand, debt, or account, including any money demand:

(2) Proceedings for foreclosure of a mortgage on land, or for cancellation, recission, or specific performance of an agreement for sale of land or for recovery of possession of land:

(3) Proceedings to acquire title to land by virtue of any tax sale:

(4) Proceedings by way of execution, attachment, or garnishment;

(5) Proceedings to sell land under or in satisfaction of any judgment or mechanic's lien; and

(6) Seizure, distress, sale, or other proceedings under an execution or under any lease, lien, chattel mortgage, conditional sale agreement, crop payment agreement, or mortgage."

11 USC, section 203(p) [Sec. 75(p)] Supplement III, ed. of 1934. (Although this enactment was an amendment of a previous subsection (p) it is the one quoted by this court in *Kalb* v. *Feuerstein*, 308 US 433, a farmer debtor case filed in the federal court on the very same date, October 2, 1934, that the first Wenning farmer debtor case was filed in the federal court, and involving the same chief issues):

"(p) The prohibitions of subsection (o) shall apply to all judicial or official proceedings in any court or under the direction of any official, and shall apply to all creditors, public or private, and to all of the debtor's property, wherever located. All such property shall be under the sole jurisdiction and control of the court in bankruptcy, and subject to the payment of the debtor farmer's creditors, as provided for in this section."

On June 28, 1934 there was enacted an amendment, 11 USC, section 203(s), [Sec. 75(s)], ed. of 1934, usually referred to as the "original Sec. 75(s)", providing a mortaorium for cases in which the provisions of sections 75(a) to (r) had not been effective. This sec. 75(s) was held to be unconstitutional in *Louisville* v. *Radford*, 295 US 555.

Thereafter a replacement was enacted, 11 USC section 203(s), Supplement III, ed. of 1934, [Sec. 75(s)] which was held to be constitutional in *Wright* v. *Vinton*, 300 US 440.

The Ohio Statutes.

The following Ohio statutes were drawn in question on the ground of their being repugnant to the Constitution and laws of the United States:

General Code of Ohio, section 11588; Laws of Ohio, Volume 115—Part 2—page 327; Volume 116, page 10; Volume 117, page 83, also found in Throckmorton's Ohio Code, 1948 Edition at page 460. So far as the following quotation is concerned (which is the only pertinent part for this appeal) this Ohio statute at all times read as follows:

> GC 11588: "When a mortgage is foreclosed or a specific lien is enforced, a sale of the property shall be ordered."

General Code of Ohio, section 11688, Throckmorton's Ohio Code, 1948 edition, page 498.

> GC 11688. "Confirmation and order for deed.—Upon the return of any writ of execution for the satisfaction of which lands and tenements have been sold, on careful examination of the proceedings of the officer, if the court finds that the sale was made, in all respects, in conformity to the provisions of this title, it shall direct the clerk to make an entry on the journal that the court is satisfied of the legality of such sale, and that the officer make to the purchaser a deed for the lands and tenements. (R.S. 5398.)"

General Code of Ohio, section 11690, Throckmorton's Ohio Code, 1948 edition, page 499.

> GC 11690. "Judgment debtor may redeem any time before confirmation.—In sales of real estate on execution or order of sale, at any time before the confirmation thereof, the debtor may redeem it from sale" . . .

3. The Decisions of the Courts Below.

In the Supreme Court of Ohio.

No opinion was rendered by the Supreme Court of the State of Ohio. The advance report of the decision of that court is found in the June 5, 1950 issue of the "Ohio Bar" (Volume XXIII, No. 11) as 153 OS 583. This volume and page will be the official report and the text will appear in the official report of the decision as it now appears in the Ohio Bar, namely: and in the Record at folio page 137, (R.).

Wenning v. *Peoples Bank*, 153 OS 583:

"*Wenning, Appellant*, v. *The Peoples Bank of Coldwater, Ohio, et al., Appellees.*

Supreme Court—Dismissal—No debatable constitutional question involved—Conflict of law—Land foreclosure proceedings instituted in Common Pleas Court, September 7, 1934,—October 2, 1934, petition filed in federal court under farmer-debtor law—Section 203, Title 11 US Code—Common Pleas judgment for P. bank, October 16, 1934—Farmer debtor proceeding terminated January 7, 1935—Farmer-debtor petition dismissed August 6, 1935—Common Pleas judgment for F. Bank and foreclosure January 26, 1938—Second farmer-debtor petition filed, January 28, 1938—Common Pleas order of sale and appraisal, January 31, 1938 — Sale advertisement, February 10, 1938 — Second farmer - debtor proceeding terminated February 24, 1938 — Amended farmer - debtor petition filed March 2, 1938, and administration reference—Restraining order to Common Pleas Court, March 9, 1938—Second farmer-debtor petition dismissed, October 10, 1938—Sale, March 12, 1938—Confirmation of sale, December 17, 1938, Federal jurisdiction of bankruptcies—Section 8, Article I, U. S. Constitution—Federal judicial power where vested—

Section I, Article III, U.S. Constitution—Supremacy of federal law—Section 7, Article XV, Constitution—Article VI, U. S. Constitution.

(No. 32075—Decided March 22, 1950)

Appeal from the Court of Appeals for Mercer county.

Mr. Elmer McClain, for appellant.

Mr. Henry J. Knapke, Mr. Carleton Reiser and Mr. David Armstrong, for appellees.

It is ordered and adjudged that this appeal as of right be, and the same hereby is, dismissed for the reason that no debatable constitutional question is involved.

Appeal dismissed.

Weygandt, C. J. Matthias, Hart, Zimmerman, Stewart, Turner and Taft, J. J. Concur."

The announcement of the denial of the petitioner's motion for an order of the Supreme Court of Ohio to the Court of Appeals of Ohio to certify its record was reported in "Ohio Bar" issue of March 27, 1950 (Volume XXIII, No. 1) on page 4 as follows:

"Motion Docket Decisions

(All are motions to certify records unless otherwise noted)"

"32075. Joseph C. Wenning, Appellant, v. The Peoples Bank Co., et al., Appellees. Mercer County. By appellees to dismiss appeal as of right. Sustained. To certify record. Overruled. 22 Ohio Bar, No. 45 Remedies."

The announcement of the denial of rehearing was reported in the "Ohio Bar" issue of April 17, 1950, (Volume XXIII, No. 4,) on page 54 as follows:

"Rehearings denied"

"32075 Joseph G. Wenning, Appellant, v. The

Peoples Bank of Coldwater et al., Appellees. Mercer County."

In the Court of Appeals of Ohio.

The Opinion of the Court of Appeals of Ohio has not been published. It appears in the record at folio 125 at (R.).

In the Common Pleas Court of Ohio.

The Opinion "(Memorandum)" of the Judge of the Common Pleas Court of Ohio has not been published. It is found in the record at folio 110 at R. .

4. The Applicable Facts and Procedures.

A Very Condensed Summary and Short Statement.

Four distinct cases are involved (1) foreclosure (12534) in the state court; (2) (3) two farmer debtor cases, (11200 and 14344) in the federal court; (4) this case which originated in the state court (13503).

This case stems from the action (13503) in the state court as a collateral attack to set aside a deed and possession under it which were issued and executed in the other action namely the foreclosure case, (12534), in the same state court. The procedures in the preceding case in the state court were interwoven with the two contemporaneous cases (11200 and 14344) in the federal court under Section 75.

The State Court Proceedings (12534) Which Are Here Collaterally Attacked.

and

The Two Contemporaneous Federal Court Proceedings (11200 and 14344).

A more detailed statement of the case, which it is believed contains all that is material to the consideration of the questions presented with detailed references to the record, is contained in the appended Brief under the heading "Statement of the Case" at page 22.

As tersely as can be condensed the history of those two contemporaneous sets of procedures in state and federal courts (12534 in the state court and 11200, and 14344 in the federal court) which took place before this case (13503) was initiated is this:

The foreclosure action (12534) was filed by the Peoples Bank, second mortgage holder, in the state court whereupon the defendant in foreclosure, petitioner here in this case, filed his petition (11200) in the federal court as a farmer debtor under Sec. 75 (a) to (r). While the federal case was pending the state court rendered foreclosure judgment to the Peoples Bank on its second mortgage and issued execution. The federal court proceedings (11200) under Sec. 75 (a) to (r) were completed and the farmer debtor filed his amended petition (also 11200) under the original Sec. 75(s). Thereafter this Court held original 75(s) unconstitutional and the new Sec. 75(s) was then enacted.

In the interval following the enactment of the new Sec. 75 (s) the state court in 12534 issued an order of sale and an appraisement was made under it but the court recalled its order of sale. Then it rendered judgment to the Federal Land Bank on its cross petition as first mortgage holder.

Within two days the farmer debtor filed a second petition (14344) under Sec. 75 (a) to (r) and while it pended

the state court (in 12534) issued a new order of sale under which an appraisement was made and filed. Thereafter the pending proceedings (14344) in the federal court under Sec. 75 (a) to (r) were completed and the farmer debtor filed his amended petition (also in 14344) under the new Sec. 75(s) which was referred to Conciliation Commissioner Rice who issued and served notice of the pendency of the federal case (14344) and a restraining order upon the state court judge, sheriff and attorneys for the Federal Land Bank, the holder of the judgment (in 12534). Notwithstanding the restraining order the sheriff went ahead with a sheriff's sale and reported sale to the Peoples Bank, holder of the second mortgage.

Subsequently the federal court entered an order dismissing the Sec. 75 (s) proceedings (14344) upon motion of the Federal Land Bank and a petition for rehearing was filed. While this petition for rehearing was pending the state court (in 12534) confirmed the sale and issued a writ of possession. Thereafter the federal court (in 14344) denied the petition for rehearing of its order dismissing the Sec. 75 (s) proceeding.

The Collateral Attack in This Case.

(Which originated in the State Court as 13503).

This case collaterally attacks the validity of the actions in the state court in case 12534 which purported to divest the petitioner of his title, to vest it in the mortgagee purchaser and its grantee and to put the grantee in possession. The petitioner initiated his collateral attack upon case 12534 by petition in a new action (13503) in the same state court and it was denied. The Court of Appeals of Ohio affirmed. The Supreme Court of Ohio denied a motion to certify and at the same time dismissed his appeal as of right upon the ground that no debatable constitutional question was involved.

II.

STATEMENT OF THE BASIS OF THE JURISDICTION OF THIS COURT.

The jurisdiction of the Court is conferred by Title 28 USC, Section 1257, particularly paragraph (3).

The petitioner has complied with Title 28 USC, Section 2101 (c).

The judgment of the Supreme Court of the State of Ohio was entered, so as to become final by the overruling of an application for rehearing, on April 12, 1950. On June 17, 1950, which date was within ninety days following the final entry of said judgment, Justice Jackson extended the time for filing this petition for certiorari to and including September 8, 1950, which is less than sixty days extension beyond said ninety days.

III.

THE QUESTIONS PRESENTED.

This petition for Certiorari presents these questions:

1.

Whether a state court may finally determine a federal question in a way conflicting with applicable decisions of this Court.

2.

Specifically whether a state court could render a judgment and decree in foreclosure at any time after the filing of a petition in a federal court under section 75, of the Bankruptcy Act, *i.e.* Title 11 USC, Section 203, and prior to its disposition, no permission to issue such judgment or decree having been granted by the federal court.

3.

Specifically whether an order of sale and appraisement could be issued by a state court at any time after the filing of a petition under Section 75 of the Bankruptcy Act, *i.e.* Title 11 USC, Section 203, in a federal court and prior to its disposition, no permission or authority to issue such order having been granted by the federal court.

4.

Specifically whether a sheriff's sale in foreclosure in a case pending in an Ohio Court, wherein an order of sale is an absolutely essential prerequisite to a sale in foreclosure, could be held and farm land sold, so as to divest the defendant in foreclosure, the owner and mortgagor of the land, of his title when no order of sale was ever issued.

5.

Specifically whether a sheriff's sale in foreclosure in a case pending in an Ohio court could divest the defendant in foreclosure, the owner of the land and its mortgagor, of his title when such sale was held in defiance of a restraining order previously served upon the state judge, the sheriff and the attorneys for the mortgagee judgment holder and creditor by an officer of the United States, namely a conciliation commissioner officially appointed by the federal court and to whom a case pending in a federal court under Sec. 75, 11 USC Section 203(s) involving said land and its owner and mortgagor, had been referred for administration in such pending case prior to the serving of said restraining order, which conciliation commissioner so acted under and exercised an authority of the United States.

6.

Specifically whether proceedings in foreclosure, in execution, or to sell land under a mortgage could be maintained in a case pending in a state court while exclusive jurisdiction over the defendant in said state court case and the land involved therein was in a federal court by virtue of Section 75, Title 11 USC, Section 203.

7.

Whether after the federal court had issued an order dismissing such case pending before it under Sec. 75, Title 11 USC, Section 203, but while a petition for rehearing of the order of dismissal was pending, the state court might validly confirm such purported sale in foreclosure so as to put title in the purported purchaser thereat through the form of executing and delivering a sheriff's deed.

8.

Whether the state court could validly order the sheriff to dispossess said defendant in foreclosure, the owner of said land and its mortgagor, and place in possession thereof the grantee named in said sheriff's deed or place in possession the grantee of said purchaser.

9.

Whether the defendant in said foreclosure action, the mortgagor of the land therein involved, has been divested of title or whether he still has title subject to the mortgages against it and subject to the status of the foreclosure proceedings before the federal court had exclusive jurisdiction.

10.

Whether Article I, Section 8, Fourth Clause, of the Constitution of the United States, and Sec. 75, Title 11 USC, Section 203, deprived the state court of all power to act in

a foreclosure action while the defendant therein and his land were within the exclusive jurisdiction of the federal court.

11.

Whether the judgments of the state courts below violated Article VI, Second Clause, which makes the Constitution and laws passed pursuant thereto the supreme law of the land.

12.

Whether the judgment of the courts below deprived the petitioner of his property without due process of law and of equal protection of the law in violation of the XIV Amendment by denying the force and validity of Sec. 75, Title 11 USC, Section 203, in disregard of the several provisions of the Constitution herein referred to.

13.

Whether a proceeding or action of or in a state court made utterly void and a nullity by laws of the United States as finally adjudicated by the Supreme Court of the United States may have any validity so that through such proceeding or action title may be divested from the owner and vested in another and repose in the latter any title whatsoever.

IV.

REASONS FOR ALLOWANCE OF THE WRIT.

1.

The decision of the courts below are in direct conflict with the decision of this Court in *Kalb* v. *Feuerstein*, 308 US 433, a case which came by appeal from the Supreme

Court of Wisconsin and involved remarkably like procedures in both state and federal courts, even to the initiation of proceedings in the federal courts on October 2, 1934 in each case during the pendency of foreclosure actions in the state courts.

2.

There is involved the important function of this Court to preserve uniformity in the construction of the Constitution and laws of the United States in all of the states and their tribunals. As declared by this Court in *Davis* v. *Packard,* 8 Peters (33 US) 312, 323, there can not be one law for Wisconsin as adjudicated by this Court (*Kalb* v. *Feuerstein,* 308 US 433) and another for Ohio as adjudicated by the courts of Ohio. (*Wenning* v. *Peoples Bank,* 153 OS 583.)

3.

This Court, the supreme judicial authority of the United States, will not permit the courts of the states to impair or fritter away the authority of the United States by contradicting the construction of federal statutes adjudicated by it. *Missouri* v. *Andriano,* 138 US 496.

4.

This Court has declared that it has an obligation to exercise its judicial power to maintain the supremacy of the Constitution and laws of the United States and of the federal government. *Harkrader* v. *Wadley,* 172 US 148, 162; *Ableman* v. *Booth,* 21 Howard (62 US) 506; In the Matter of *Heff,* 197 US 488, 505; *Greene* v. *Neal,* 6 *Peters,* (31 US) 291, 298.

5.

It is a matter of the greatest public interest whether state courts, judges, officials and litigants shall be permitted to flout the authority of the Constitution of the

United States, the legislation of the Congress of the United States, and the most positive declarations of this Court as announced in *Kalb* v. *Feuerstein,* 308 US 433, wherein no less than sixteen times its unanimous decision declared, in a case squarely based upon procedures remarkably like this *Wenning* case, that:

(Pages 438-439) "It is generally true that a judgment by a court of competent jurisdiction bears a presumption of regularity and is not thereafter subject to collateral attack. But Congress, because its power over the subject of bankruptcy is plenary, may by specific bankruptcy legislation create an exception to that principle and render judicial acts taken with respect to the person or property of a debtor whom the bankruptcy law protects nullities and vulnerable collaterally. Although the Walworth County Court had general jurisdiction over foreclosures under the law of Wisconsin, a peremptory prohibition by Congress in the exercise of its supreme power over bankruptcy that no State court have jurisdiction over a petitioning farmer-debtor or his property, would have rendered the confirmation of sale and its enforcement beyond the County Court's power and nullities subject to collateral attack."

(Page 443) "In harmony with the general plan of giving the farmer an opportunity for rehabilitation, he was relieved—after filing a petition for composition and extension—of the necessity of litigation elsewhere and its consequent expense. This was accomplished by granting the bankruptcy court exclusive jurisdiction of the petitioning farmer and all his property with complete and self-executing statutory exclusion of all other courts.

The mortgagees who sought to enforce the mortgage after the petition was duly filed in the bankruptcy court, the Walworth County Court that attempted to grant the mortgagees relief, and the sheriff who enforced the court's judgment, were all acting in violation of the controlling Act of Congress. Because that

State court had been deprived of all jurisdiction or power to proceed with the foreclosure, the confirmation of the sale, the execution of the sheriff's deed, the writ of assistance, and the ejection of appellants from their property—to the extent based upon the court's actions—were all without authority of law."

6.

By persistence in following through the state court procedure pursuant to the normally applicable statutes of the State of Ohio in the foreclosure case in utter disregard of the United States Constitution, Sec. 75, 11 USC, Sec. 203, and the many decisions of this Court and of the United States Court of Appeals for the Sixth Circuit, which includes Ohio, the state court deprived the petitioner of his property, literally so because the sheriff under an order of the court forceably removed the petitioner from his farm and home, without due process of law.

The petitioner by his collateral attack directly challenges all of the acts of the state court, its agents and the litigants in the foreclosure case which were in defiance of the Constitution of the United States, the laws of the United States passed in pursuance thereof and the decisions of this Court.

7.

The decisions of the state courts below out of which this petition for certiorari arises would, if permitted to stand without rectification by this Court, deprive the petitioner without due process of law of his property by upholding and sustaining utterly void processes in the form of law to destroy his title and forcibly evict him from his land.

8.

The validity of statutes of the United States was repeatedly drawn in question in each of the three state courts below by the objections specifically elaborated by the pe-

titioner setting out that in the foreclosure action when the state court and its officers, agents and litigants repeatedly and defiantly disregarded, as if nonexistent, the provisions of Sec. 75, Title 11 USC, Section 203, by entering judgment to the Peoples Bank, issuing execution thereon, issuing order of sale and appraisement 328, insisting upon and conducting a sheriff's sale and purporting to sell the petitioner's land, confirming said sale and executing and delivering a deed based thereon and finally evicting the petitioner and putting the pseudo purchaser, or its grantee, in possession, all in direct defiance of the provisions of said statutes and in defiance of a restraining order issued by an officer of the court acting under authority of the United States.

9.

The validity of statutes of the State of Ohio, namely General Code Section 11588, 11688 and 11690, which normally prescribe the course of procedures in actions to foreclose a mortgage on real estate, are directly drawn in question on the ground of their being repugnant to the Constitution and statutes of the United States, namely Article I, Section 8, Fourth Clause, which grants power to the Congress of the United States to legislate upon the subject of bankruptcies, Article VI which makes laws enacted pursuant thereto the supreme law of the land, above state laws, judges and officials, requiring each judge and officer to make oaths to support said Constitution.

10.

The petitioner claims title and right to his real estate and claims immunity from foreclosure proceedings conducted in defiance of the Constitution and laws of the United States, and he specially set up and claimed the same under the Constitution and statutes and authority of the United States.

Your petitioner accordingly prays that a Writ of Certiorari be issued to the Supreme Court of the State of Ohio directing it to certify to this Court a transcript of the record and proceedings therein for the final determination of this Court and for all proper relief.

Respectfully submitted,

ELMER MCCLAIN,
Lima, Ohio,
Counsel for Petitioner,
Joseph G. Wenning.

Lima, Ohio
August 22, 1950.

BRIEF

In Support of the Foregoing Petition for Writ of Certiorari.

I.

Report of the Decision Below.

In the Supreme Court of Ohio.

No opinion was rendered. The memorandum of denial of motion to certify and dismissal of appeal as of right on the ground that no constitutional question is involved is reported in the June 5, 1950 issue of the "Ohio Bar" (Volume XXIII, No. 11) as *Wenning* v. *Peoples Bank*, 154 OS 583. This report and the other extracts from the Ohio Bar pertaining to this case in that court are fully set forth at page 7 of the preceeding Petition for Certiorari. They are also found in the Record at folio 137, R. .

In the Court of Appeals of Ohio.

The Opinion of the Court of Appeals of Ohio has not been published. It appears in the record as folio 125 at R. .

In the Common Pleas Court of Ohio.

The Opinion ("Memorandum") of the Judge of the Common Pleas Court of Ohio has not been published. It is found in the record as folio 110 at R. .

II.

Grounds Upon Which the Jurisdiction of This Court Is Invoked.

The basis for the Jurisdiction of this Court has been set forth at page 12 in the Petition for Writ of Certiorari which precedes this brief under the heading "Statement of the Basis of the Jurisdiction of this Court".

III.

STATEMENT OF THE CASE.

This is the more full statement of the case referred to in the proceding petition at page 9 at the heading "The Applicable Facts and Procedures".

For ready reference and to facilitate understanding the corelation of proceedings in state and federal courts they are put into two columns.

Pertinent Proceedings in the State Court Foreclosure Case 12534 and in the Federal Court Farmer Debtor Cases 11200 and 14344.

STATE COURT	FEDERAL COURT
1934	
Case 12534	Case 11200
September 7, 1934. Petition in foreclosure filed by Peoples Bank, holder of second mortgage. Ex. 1, folio 1, R.	
	October 2, 1934. Petition 75 filed in federal court, approved and referred. Ex. 2, folio 47, R. .....; 6A, folio 54, R. .....; 6C, folio 56, R. .....; 7, folio 57, R. .....
October 16, 1934. Judgment and decree of foreclosure to Peoples Bank. Ex. 9, folio 6, R.	
1935	
	January 2, 1935. Farmer debtor proceedings under Sec. 75 (a) to (r) completed. Ex. 2, folio 47, R. .....
January 24, 1935. Execution 4384 issued on Judgment to Peoples Bank. Ex. 10, folio 61, R. ..... Ex. 1, folio 1, R.	

February 21, 1935. Amended Petition under original Sec. 75 (s) filed, adjudication and reference to conciliation commissioner. Ex. 2, folio 47, R. .....

March 28, 1935. Execution 4384 returned without action. Ex. 1, folio 1, R. .....

May 27, 1935. (Original Sec. 75 (s) held unconstitutional. *Louisville* v. *Radford,* 295 US 555.)

August 6, 1935. Upon application of farmer debtor case under original Sec. 75(s) dismissed. Ex. 2, folio 47, R. .....

August 28, 1935. (New. Sec. 75(s) passed. Title 11 USC, Sec. 203.)

1936

April 25, 1936. Order of sale 289 issued. Ex. 1, folio 1, R. .....

June 5, 1936. Appraisement filed. Order of sale 289 returned unexecuted by order of court. Ex. 1, folio 1, R. .....

1937

October 18, 1937. Motion of Farmer debtor to reinstate case 11200 denied. Ex. 2, folio 47, R.....

1938 Case 14344

January 26, 1938. Judgment and decree of foreclosure to Federal Land Bank. Ex. A, folio 101, R. .....

January 28, 1938. A second petition 75 filed, approved and referred to conciliation commissioner Rice. Ex. 3, folio 49 R. .....; 12A, folio 63, R. .....; 12C, folio 65, R. .....

January 31, 1938. Order of sale 328. Ex. 1, folio 1, R. .....

February 8, 1938. Appraisement filed. Ex. 1, folio 1, R. .....

February 19, 1938. Motion of Federal Land Bank to dismiss heard and denied by conciliation commissioner.

February 24, 1938. Certificate of completion of proceedings under Sec. 75 (a) to (r). Ex. 3, folio 49, R. .....

March 2, 1938. Amended petition 75(s) filed; adjudication and order of reference to conciliation commissioner Rice. Ex. 17, folio 71, R. .....; 18, folio 73, R. .....; 19, folio 74, R. .....

March 3, 1938. Motion by Federal Land Bank to dismiss case filed in federal court. Ex. 3, folio 49, R. .....

March 7, 1938)
March 9, 1938)—Service of notice and restraining order by conciliation commissioner Rice in state court case 12534 upon state court judge, sheriff and attorneys for Federal Land Bank. Ex. 20, 21, folio 76, 79, R. .....

March 7, 1938)
March 9, 1938)—Service of restraining order by conciliation commissioner Rice in state court case 12534 upon state court judge, sheriff and attorneys for Federal Land Bank. Ex. 20, 21, folio 76, 79, R. .....

March 12, 1938)
March 14, 1938)—Sheriff's sale and report of sale to People Bank (John Weigle, Cashier) Ex. 1, folio 1, R. ..... Ex. 16, folio 69, R. .....

October 10, 1938. Order of federal court dismissing case 14344 under Sec. 75(s) Ex. C, folio ...., R. .....

November 16, 1938. Petition for rehearing. Ex. 3, folio 49, R. .....

December 17, 1938. Sale confirmed. Sheriff's deed delivered. Ex. 22, 23, folio 82, 84, R. .....

December 29, 1938. Writ of possession issued by order of judge to sheriff and executed. Ex. 1, folio 1, R. ..... Ex. 24, folio 87, R. .....

1939

January 11, 1939. Petition for rehearing denied. Ex. 3, folio 49, R. .....

March 8, 1939. Execution of writ of possession reported. Ex. 24, folio 87, R. .....

IV.

Specification of Errors.

1.

The Supreme Court of Ohio erred in refusing to hear and determine the decree and judgment of the Court of Appeals of Ohio by dismissing petitioner's appeal as of right and overruling his motion for an order to the Court of Appeals of Mercer County, Ohio to certify its record up for review.

2.

The courts below erred in disregarding and violating the mandatory provisions of Sec. 75, (Title 11 USC, section 203), particularly Section 75 (n)(o) and (p) [subsection 203(n), subsection 203 (o) and subsection 203 (p)] which ousted the state court and all its agents of all jurisdiction and power to act in relation to the real estate involved in the foreclosure action in case number 12534 in the Common Pleas Court of Mercer County, Ohio, while the petitioner had a case pending in the United States Court under said Section 75 (Title 11 USC, section 203). *Kalb* v. *Feuerstein,* 308 US 433.

They should have held that all proceedings and actions in the said foreclosure case number 12534 in the common pleas court taken and performed while appellant, the owner of the real estate involved, had a case filed in the United States Court under said United States statute were nullities wholly void and ineffective, but their decisions were

against the validity of said statutes of the United States and in favor of the validity of the statutes of the state, namely, General Code, sections 11588, 11688 and 11690, and other sections of the General Code of Ohio.

3.

The courts below erred in refusing to be bound by Article I, Section 8, Fourth Clause, of the Constitution of the United States investing the Congress with power to establish laws on the subject of bankruptcies throughout the United States.

They should have enforced the United States statute, namely Section 75 (Title 11 USC, section 203), a law established pursuant to said constitutional provision, by restoring title to the appellant as it existed prior to the void proceedings and actions in the Common Pleas Court in said foreclosure action 12534, but they decided in favor of the validity of state statutes which provided for such proceedings and actions and against the validity of the United States statute.

4.

The courts below erred in disregarding Article VI, Second and Third Clauses, of the Constitution of the United States which provides that the laws of the United States are the supreme law of the land, making the constitutional enactment of any United States statute the supreme law over every constitutional and statutory provision of any state and over the procedures followed by any court of a state, and they so erred in disregarding the oath which is required of all judicial officers of the state to be bound by the Constitution of the United States.

The courts below should have adjudged the proceedings and actions of the common pleas court and its agent in

the foreclosure case 12534 to be absolute nullities incapable of having any effect because such proceedings and actions occurred while the petitioner had a case pending under said United States statutes, namely Section 75 (Title 11 USC, section 203), in the United States Court, but they decided in favor of the validity of said state statutes which provided for such proceedings and actions and against the validity of said United States statutes.

5.

The judgments of the courts below deprived the petitioner of his property without due process of law and of equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States by denying the force and validity of Section 75 Title 11 USC, section 203) in disregard of the several provisions of the Constitution of the United States herein referred to.

Said judgments should have held that said United States statutes made absolutely void and absolute nullities and of no effect, all proceedings in the Common Pleas Court of the State of Ohio in the said foreclosure action against the petitioner in case number 12534 in that court which occurred while he had filed in the United States Court his case under said United States statute. *Kalb* v. *Feuerstein,* 308 US 433.

6.

The courts below erred in giving and adjudging effect and validity to the state common pleas court proceedings and actions which occurred in said foreclosure case number 12534 while the petitioner, then defendant in said foreclosure case, had a petition filed in the United States Court under Section 75 (Title 11 USC, section 203) involving the same real estate as that involved in said foreclosure action, which proceedings and actions in said common pleas court were rendered absolutely void and utter nullities by

subsections 75 (n), (o) and (p) [subsections 203 (n), (o) and (p)] of said statute of the United States, fully adjudicated to be so by this Court in a case on all fours, namely, *Kalb* v. *Feuerstein*, 308 US 433.

Specifically, the proceedings in said common pleas court in said foreclosure action which were utterly void and ineffective were:

1. Personal judgment and decree in foreclosure entered in form against the petitioner fourteen days after he had filed his petition in the United States Court under Section 75 (Title 11 USC, section 203), without any permission ever being sought or granted pursuant to said statute whereby said foreclosure decree and personal judgment might have been lawfully entered.

2. Thereafter while said petition was still pending in the United States Court and without any permission or authority being sought or granted to enforce said decree in foreclosure and personal judgment and execution in form was issued to enforce said decree and judgment.

3. Thereafter an order of sale was issued and returned by order of court.

4. Thereafter an order of sale and order of appraisement in form was issued and a form of appraisement returned in said Court while a petition by petitioner was filed in said United States Court, without any permission or authority having been sought or granted.

5. Thereafter without any permission or authority being sought or granted and while a petition under Section 75 (Title 11 USC section 203), was filed in the United States Court and in disobedience and in defiance of a restraining order issued out of the said United States Court and served upon the judge and sheriff of said common

pleas court in said foreclosure case 12534 and upon the attorneys for a judgment creditor therein a form of sheriff's sale was conducted by the sheriff and report of sale made by him to the Court.

6. Thereafter the judge of said common pleas court in said foreclosure action 12534 purported to confirm said sale to the agent of the respondent Peoples Bank.

7. Thereafter upon a form of order of writ of possession issued by the judge of said common pleas court, in said foreclosure action the sheriff unlawfully removed the appellant, his family, his household goods and his other chattels from the farm residence and from the said farm of the petitioner, the defendant in said foreclosure case number 12534, which farm was the real estate involved in said foreclosure action.

7.

The courts below erred in holding, against the validity of Section 75 (Title 11 USC, section 203) and in favor of the validity of the said statutes of the State of Ohio, that the said common pleas court could by its order, entered after power had been restored to it, give force and effect to the prior void proceedings and actions therein which were rendered absolute nullities and wholly ineffective by said United States statutes and by said United States Constitutional provisions, namely, Article I, Section 8, Fourth Clause; Article VI, Second and Third Clauses; and the Fourteenth Amendment, and thereby deprived the petitioner Joseph G. Wenning of his property without due process of law, and of the equal protection of the laws.

8.

The courts below denied the title, right and immunity specially set up and claimed by the petitioner under the Constitution and statutes of the United States.

9.

The courts below denied the right, privileges and immunity specially set up and claimed by the petitioner under an authority of the United States exercised by an officer of the United States namely conciliation commissioner Rice.

10.

The courts below decided a federal question not in accord with applicable decisions of this Court.

11.

The courts below erred in giving validity to the acts of an agent or officer of the state court, namely the sheriff, which acts were by said courts presumed to be authorized and validated by the laws of the State of Ohio despite their repugnancy to the Constitution and laws of the United States specially set up and claimed by the petitioner.

V.

SUMMARY OF THE ARGUMENT.

A Statement of the Plan and Purpose of this Brief.

It is limited to support of the petition by showing why this Court should grant certiorari.

1.

Summary of Point One

("Reason" No. 1 in the Petition.)

In this collateral attack upon the acts and proceedings of the state court in foreclosure case 12534 the state courts below decided a federal question in direct conflict with decisions of this Court, particularly *Kalb* v. *Feuerstein*, 308 US 433, which also was a collateral attack upon the acts and proceedings of a state court in a setting remarkably like this *Wenning* case.

2.

Summary of Point Two

("Reasons" 2, 3 and 4 in the Petition)

It is the highest function of this Court to preserve the integrity and unity of the United States in its unique dual character of one state binding together many states.

Preservation of uniformity of construction of constitution and laws and their supremacy and the supremacy of the United States under the Constitution is the duty of this Court.

3.

Summary of Point Three

("Reason" No. 5 in the Petition)

The great public interest involved in the case here presented.

4.

Summary of Point Four

("Reasons" 6 and 7 in the Petition)

The petitioner was deprived of his property without due process of law by the proceedings in the foreclosure case and by the courts below in sustaining those proceedings.

5.

Summary of Point Five

("Reasons" 8 and 9 of the Petition)

The validity of United States laws and the validity of state laws, as repugnant to the Constitution and laws of the United States were drawn in question.

6.

Summary of Point Six

("Reason" No. 10 in the Petition)

The petitioner specially set up his claim of constitutional immunity from foreclosure and his right, title and privilege to have his land freed from the void but entangling procedures of the foreclosure action.

VI.

ARGUMENT.

Plan and Purpose of This Brief.

It is conceived that it is the function of a brief in support of a petition for certiorari to present arguments to show the special and important reasons why this Court ought to review the case presented.

This brief will therefore be confined within such limits without arguing the merits of the case except where they fall within these limits.

1.

Argument of Point One.

("Reason" No. 1 in the Petition)

That The Decisions Below Directly Conflict With Kalb v. Feuerstein, 308 US 433.

This *Wenning* case is a collateral attack, originating in the state court, (folio 7, R.) upon other proceedings in that court in foreclosure case 12534 (Ex. 1, folio 1, R.) which progressed into the State Supreme Court of Ohio and is the subject of this petition.

Likewise *Kalb* v. *Feuerstein,* 308 US 433 was a collateral attack, originating in a state court, upon state court foreclosure proceedings in another case which progressed into the State Supreme Court of Wisconsin and came on appeal to this Court.

In the *Wenning* case the foreclosure action was pending in the Ohio Court (Ex. 1, folio 1, R.) when on October 2, 1934, Mr. Wenning filed his petition under Sec. 75 (Ex. 1, folio 1, R.) as a farmer debtor in the United States Court. Thereafter in the state court, notwithstanding the self executing exclusive jurisdiction of the federal court [(Sec. 75 (n) and (p)] and the mandatory prohibitions against the state court [Sec. 75 (o)], the judge and sheriff proceeded with judgment of foreclosure on through to sale and report of sale Ex. 1, folio 1 R.). The sale proceedings were also in violation of a restraining order issued out of the federal court. Ex. 20, 21, folio 76, 79. R. ..... which was a collateral action, that came to this court on appeal.

In the *Kalb* case which was a collateral action, that came to this court on appeal, foreclosure had been pending in a Wisconsin court in a prior case and had progressed to judgment of foreclosure when on October 2, 1934 (the same date the Wenning farmer debtor petition was filed) Mr. Kalb filed his farmer debtor petition in the federal court. Thereafter the state court, nothwithstanding the same self executing and mandatory provisions of the same federal statute [(Section 75 (n) (o) and (p)] the judge and sheriff proceeded with sale in foreclosure, confirmation of sale and writ of assistance executed by evicting the farmer debtor and putting the mortgagee purchaser in possession.

Eight years of litigation, initiated by the collateral action, ensued before Mr. Kalb was restored to possession. Mr. Wenning is still out of possession.

[The likenesses of the two cases extends even to the attitude of the judge in each of the foreclosing courts. In

the *Kalb* case it is a matter of record that the Wisconsin judge—even after the unanimous decision of this court in *Kalb* v. *Feuerstein,* 308 US 433—testified that he had given the matter a week of hard study and still believed he was right and this Court was wrong. In the *Wenning* case, it is a matter of common knowledge and known to all counsel, stated in open court and not denied, that the Ohio judge said (politely transliterating) that no federal court could deprive his court of its previously asquired jurisdiction.]

No stay of foreclosure or of subsequent action to enforce it was ever sought or granted under sec. 75 (o) in either case. (For the *Wenning* case see certificate of clerk of federal court Ex. 11, folio 62, R.) and Ex. 15, folio 68, R.). However, as has been said, in the Wenning second farmer debtor case 14344 while it was under Sec. 75(s), controlled also by Sec. 75(n) and (p), the conciliation commissioner issued and served upon the judge, sheriff and counsel for litigants a restraining order prohibiting state court proceedings. Ex. 20, 21. (One document ending with certificate of the clerk of the federal court) folio 79, 82 R.).

In addition, in the *Wenning* case the sheriff and the immediate grantee of the purchaser at the sheriff's sale, who (not the purchaser) was put into possession when Mr. Wenning was evicted, were notified and warned by the petitioner through his counsel by letters that title still vested in Mr. Wenning who would insist upon his rights. Letters of January 12, 14, and 31 and February 3, 1939. Exhibits 25A, B, C, 26, folio 88, 89, R.). Also the testimony of the sheriff (R. .....) and of Respondent Plieman. R. .....

With the foregoing parallel case histories it suffices to refer to the unanimous opinion of this Court (by Justice Black) in *Kalb* v. *Feuerstein,* 308 US 433.

Page 436: "The questions in both No. 120 and No. 121 are whether the Wisconsin County Court had jurisdiction, while the petition under the Frazier-Lemke Act was pending in the bankruptcy court, to confirm the sheriff's sale and order appellants dispossessed, and, if it did not, whether its action in the absence of direct appeal is subject to collateral attack."

Page 438: After stating the position of the Wisconsin State court,

"But if appellants are right in their contention that the Federal Act of itself, from the moment the petition was filed and so long as it remained pending, operated, in the absence of the bankruptcy court's consent, to oust the jurisdiction of the State court so as to stay its power to proceed with foreclosure, to confirm a sale, and to issue an order ejecting appellants from their farm, the action of the Walworth County Court was not merely erroneous but was beyond its power, void, and subject to collateral attack. And the determination whether the Act did so operate is a construction of that Act and a Federal question."

Page 439: . . . "Although the Walworth County Court had general jurisdiction over foreclosures under the law of Wisconsin, a peremptory prohibition by Congress in the exercise of its supreme power over bankruptcy that no State court have jurisdiction over a petitioning farmer-debtor or his property, would have rendered the confirmation of sale and its enforcement beyond the County Court's power and nullities subject to collateral attack. The States cannot, in the exercise of control over local laws and practice, vest State courts with power to violate the supreme law of the land. The Constitution grants Congress exclusive power to regulate bankruptcy and under this power Congress can limit the jurisdiction which courts, State or Federal, can exercise over the person and property of a debtor who duly invokes the bankruptcy law. If Congress

has vested in the bankruptcy courts exclusive jurisdiction over farmer-debtors and their property, and has by its Act withdrawn from all other courts all power under any circumstances to maintain and enforce foreclosure proceedings against them, its Act is the supreme law of the land which all courts—State and Federal—must observe. The wisdom and desirability of an automatic statutory ouster of jurisdiction of all except bankruptcy courts over farmer-debtors and their property were considerations for Congress alone.

We think the language and broad policy of the Frazier-Lemke Act conclusively demonstrate that Congress intended to, and did deprive the Wisconsin County Court of the power and jurisdiction to continue or maintain in any manner the foreclosure proceedings against appellants without the consent after hearing of the bankruptcy court in which the farmer's petition was then pending."

The opinion then quotes Section 75 (n) (o) and (p).

Page 441: "Thus Congress repeatedly stated its unequivocal purpose to prohibit—in the absence of consent by the bankruptcy court in which a distressed farmer has a pending petition—a mortgagee or any court from instituting, or maintaining if already instituted, any proceedings against the farmer to sell under mortgage foreclosure, to confirm such a sale, or to dispossess under it.

This congressional purpose is more apparent in the light of the Frazier-Lemke Act's legislative history. Clarifying and altering the sweeping provisions for exclusive Federal jurisdiction in the original Act, Congress made several important changes in 1935. It was then that subsection (p) was amended so that the prohibitions in subsection (o) of any steps against a farmer-debtor or his property once his petition is filed were made specifically applicable 'to all judicial or official proceedings in any court or under the direction of any official, and . . . to all creditors, public or

private, and to all of the debtor's property, wherever located. All such property shall be under the sole jurisdiction and control of the court in bankruptcy, and subject to the payment of the debtor farmer's creditors, as provided for in Section 75 . . .' "

Page 443: . . . "In harmony with the general plan of giving the farmer an opportunity for rehabilitation, he was relieved—after filing a petition for composition and extension—of the necessity of litigation elsewhere and its consequent expense. This was accomplished by granting the bankruptcy court exclusive jurisdiction of the petitioning farmer and all his property with complete and self-executing statutory exclusion of all other courts.

The mortgagees who sought to enforce the mortgage after the petition was duly filed in the bankruptcy court, the Walworth County Court that attempted to grant the mortgagees relief, and the sheriff who enforced the court's judgment, were all acting in violation of the controlling Act of Congress. Because that State court had been deprived of all jurisdiction or power to proceed with the foreclosure, the confirmation of the sale, the execution of the sheriff's deed, the writ of assistance, and the ejection of appellants from their property—to the extent based upon the court's actions—were all without authority of law."

Page 444: "Congress manifested its intention that the issue of jurisdiction in the foreclosing court need not be contested or even raised by the distressed farmer-debtor. The protection of the farmers was left to the farmers themselves or to the Commissioners who might be laymen, and considerations as to whether the issue of jurisdiction was actually contested in the County Court, or whether it could have been contested are not applicable where the plenary power of Congress over bankruptcy has been exercised as in this Act."

Because of the fact that the judgment to the Federal Land Bank (Ex. A, folio 101, R.) was entered when no federal case was pending, and was therefore valid, and two days later while the second farmer debtor case 14344 was filed in the federal court (Ex. 3, folio 49 R. Ex. 12A, folio 63 (R. Ex. 12C, folio 65 R.) and invalidated the order of sale 328 issued three days thereafter (Ex. 1, folio 1, R. Ex. 16 folio 69, R. , it is important to know whether in Ohio foreclosures a sheriff's sale is absolutely necessary to cut off title and vest it in another. The following is quoted:

From General Code of Ohio, Section 11588:

> "When a mortgage is foreclosed or a specific lien is enforced, a sale of the property shall be ordered."

27 Ohio Jurisprudence, "Mortgages" section 522, page 696:

> "A judicial sale has its very foundation in a decree or order of sale passed by a court of competent jurisdiction. By the express command of the Code, when a mortgage is foreclosed a sale of property shall be ordered;" General Code of Ohio, section 11,588.

24 Ohio Jurisprudence, "Judicial Sales" section 13, page 17:

> "A judicial sale has its very foundation in a decree or order of sale passed by a court of competent jurisdiction. It is the decree that supplies the authority upon which the officer to make the sale must act. Furthermore, purchasers at a judicial sale are protected when the power to make the sale is expressly given; otherwise they are not. Not only is an order of sale necessary to make a valid sale, but the order must be made prior to the sale."

2.

Argument of Point Two.

("Reasons" 2, 3 and 4 in the Petition)

To Preserve Uniformity in Construction of the Constitution and Laws of the United States.

As Supreme Judicial Authority This Court Will Not Permit State Courts to Impair United States Authority.

The Supremacy of the Constitution and Laws of the United States and of the United States Must be Maintained.

Can it be questioned that the highest (the only?) function of the Supreme Court of the United States is to preserve the integrity, the single wholeness, of the UNITED STATES in its dual form of one big sovereign state binding together many smaller sovereign states which have granted only particularly specified portions of their sovereignty to the United States?

It must preserve the uniformity of construction of the Constitution and laws of the United States in all of the states. *David* v. *Packard,* 8 *Peters* (33 US) 312, 323. Which construction of Section 75 (Title 11 USC, sec. 203) shall be followed? That of this Court in *Kalb* v. *Feuerstein,* 308 US 433, or that of the State of Ohio in *Wenning* v. *Peoples Bank,* 154 OS 583, in refusing to review the decisions of the lower Ohio courts which flatly disagree with this Court's construction.

The nub of it all is illustrated by the following from the "Memorandum" of the common pleas court (folio 110, R.) (sixth paragraph):

(folio 111). "If any of said ministerial acts validly ordered by the Court were irregular or void, do not the Ohio Statutory provisions which provide for the procedure provide that it is the Court of this state which shall make the determination as to the validity of those acts? Certainly the Common Pleas Court on December 17, 1938, had both the jurisdiction and the power to make the determination made and if the Court did commit error the plaintiff was afforded due process of law by his right of hearing and his right to take the matter to the Court of Appeals on error."

And from the Opinion of the Court of Appeals (folio 125, R.) (near the end of the opinion):

(folio 128). "The appraisal, advertising for sale, and sale, of the real estate by the sheriff were not judicial acts, but merely ministerial acts, the performance of which was not inhibited, prohibited or precluded in any way by reason of the filing by plaintiff, of a new farmer-debtor petition on January 28, 1938. Said acts were therefore performed in due course of law.

The appraisal, advertising for sale, and sale, of said real estate by the sheriff, not being judicial acts but merely ministerial acts, the Common Pleas Court, on December 17, 1938, being then free to fully exercise its jurisdiction in said foerclosure proceeding, had jurisdiction and power to render judgment confirming said sale, and its judgment may not be set aside in this action.

Furthermore, if said acts of the sheriff in the respects mentioned had been wholly void, the action of the court in confirming said sale was within its jurisdiction and power, and was not void but merely voidable, and subject to attack only through error proceedings prosecuted from said judgment, and not by separate action such as the plaintiff seeks to maintain."

Set against these opinions is that of this Court in *Kalb* v. *Feuerstein*, 308 US 433, at page 443 that:

> "The mortgagees who sought to enforce the mortgage after the petition was duly filed in the bankruptcy court, and Walworth County Court that attempted to grant the mortgagees relief, the sheriff who enforced the court's judgment, were all acting in violation of the controlling Act of Congress. Because that State had been deprived of all jurisdiction or power to proceed with the foreclosure, the confirmation of the sale, the execution of the sheriff's deed, the writ of assistance, and the ejection of appellants from their property to the extent based upon the court's actions—were all without authority of law."

And at page 444:

> "Congress manifested its intention that the issue of jurisdiction in the foreclosing court need not be contested or even raised by the distressed farmer-debtor" . . . "and considerations as to whether the issue of jurisdiction was actually contested in the County court, or whether it could have been contested, are not applicable where the plenary power of Congress over bankruptcy has been exercised as in this Act."

There is an *implied intimation* in the Ohio Court of Appeals opinion, in the first of the three paragraphs quoted above (beginning at folio 128), that the acts of the sheriff in the foreclosure action could not be "inhibited, prohibited, or precluded" by a "new farmer-debtor petition." Was it meant that after one farmer debtor petition was filed a second one would be without any effect? This court decided in *Wragg* v. *Federal*, 317 US 325, this court, in its unanimous opinion by Chief Justice Stone, at page 328, that

> "We find no intimation in the language and purpose of the Act that an unsuccessful earlier proceeding

would preclude a new petition so long as the farmer retains an interest which could be administered in a proceeding under section 75."

The filing of a second petition in a section 75 proceeding has uniformly been sustained in the lower courts, for instance, *Feuerstein* v. *Kalb*, 127 F2 509 (CCA7); *Layton* v. *Thayne*, 133 F2 287 (CCA10); *Re Boyer*, 138 F2 349 (CCA8), as it has been in regular bankruptcy.

Nor will this Court permit the states to fritter away the authority of the United States by contradicting this Court's construction of its Constitution and laws. *Missouri* v. *Andriano*, 138 US 496.

Many times this Court has asserted its obligation to maintain the supremacy of the Constitution and laws of the United States. For example: *Harkrader* v. *Wadley*, 172 US 148, 162; *Ableman* v. *Booth*, 21 *Howard* (62 US) 506; *In the Matter of Heff*, 197 US 488, 505; *Green* v. *Neal*, 6 Peters, (31 US) 291, 298.

3.

Argument of Point Three.

("Reason" No. 5 in the Petition)

That The Petition For Certiorari Presents A Case of Great Public Interest.

It is of the greatest interest to the public that a state shall not digress from that uniformity of construction and observance of federal law that is the cement binding forty-eight sovereign states into one coherent government in the respects ceded by them to that government for the benefit of all.

Europe's glaring example of the people of a continent rent by international conflicts since the beginning of recorded history at the least, is the inevitable denouement of entering wedges just such as *Wenning* v. *Peoples Bank*, 153 OS 583, to which this petition for certiorari is directed.

4.

Argument of Point Four.

("Reasons" 6 and 7 in the Petition)

The Foreclosure Proceedings Deprived Petitioner Of His Property Without Due Process of Law.

The Courts Below In The Collateral Attack Case Also Deprived The Petitioner Of This Property Without Due Process Of Law.

The persistent following through of state foreclosure procedure, in defiance not only of self executing mandatory federal statutes but also of peremptory restraining orders, which is collaterally attacked in this case, and the decisions of the court below if not rectified by this court, effectually deprive the petitioner of his property without due process of law.

Three Constitutional provisions were defied, the Fourteenth Amendment which guarantees to the citizen of every state due process of law and equal protection of the laws, Article I which grants exclusive power to the United States in the subject of bankruptcies, and Article VI which makes the Constitution and laws passed pursuant to it the supreme law.

5.

Argument of Point Five.

("Reasons" 8 and 9 of the Petition)

The Validity Of Federal Law Is Drawn In Question.

The Validity Of State Laws As Repugnant To The Constitution And Laws Of The United States Is Drawn In Question.

The drawing in question of section 75 (Title 11 USC, sec. 203) is quite clear. The opinions of the two lower courts, which the State Supreme Court declined to review, expressly held that the federal law was of no effect.

The petitioner directly draws in question the repugnancy of the state foreclosure statutes to the United States Constitution and statutes as applied to the foreclosure action during the times when the federal court had exclusive jurisdiction and the state court was devoid of all power.

6.

Argument of Point Six.

("Reason" No. 10 in the Petition)

The Right, Title, Privilege And Immunity of the Plaintiff.

The petitioner has especially set up, his claim of immunity from foreclosure under the Constitution and laws of the United States and, also his right, title, and privilege to his land free from all void but entangling procedures of the state court in the foreclosure action.

He seeks the benefits of the laws of his state for redemption of his farm real estate by restoration of the foreclosure case to the status it had before the breaches of federal authority occurred.

CONCLUSION.

The writ should be granted because there is involved a state court decision which directly countenanced decisions contradictory to a decision of this Court; uniformity of construction and supremacy of the laws of the United States and decisions of this Court are involved; the questions involved are matters of great public interest; the petitioner has been deprived of his property without due process of law; the validity of federal law and of state laws, as repugnant to the Constitution and federal laws, have been drawn in question; and the petitioner, despite his claim of immunity, right, title and privilege specially set up by him, has been deprived of his property without due process of law and the equal protection of the law.

Respectfully submitted,

ELMER MCCLAIN,
Counsel for Petitioner

Lima, Ohio
August 26, 1950.

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